IN THE

SUPREME COURT OF THE UNITED STATES

No. A-950

HAROLD D. STIVERS — Petitioner

versus

KENTUCKY STATE BAR ASSOCIATION — Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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IN THE

SUPREME COURT OF THE UNITED STATES

No. A-950

HAROLD D. STIVERS - - - - *Petitioner*

v.

KENTUCKY STATE BAR ASSOCIATION - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

The petitioner, Harold D. Stivers, asks that a writ of certiorari issue to review the judgment of the Kentucky Court of Appeals made and entered on November 19, 1971.

OPINIONS IN THE COURT BELOW

The opinion of the Kentucky Court of Appeals, reported at 475 S. W. 2d 900, appears in the Appendix hereto. The findings and recommendations of the Trial Committee that held the evidentiary hearing and the findings and recommendations of the Board of Governors, based thereon, to the Kentucky Court of Appeals, are included in the Appendix hereto.

JURISDICTION

The judgment of the Kentucky Court of Appeals was entered on November 19, 1971. A timely petition for rehearing was denied on March 3, 1972. On March 16, 1972, Associate Justice Potter Stewart of the Supreme Court of the United States, ordered that the execution and enforcement of the mandate of the Court of Appeals of Kentucky be stayed, pending the filing of a petition for a writ of certiorari in this Court within (30) days from the date of the order. It has been so timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Were certain Rules of Practice and Procedure of the Kentucky Court of Appeals for disciplining attorneys and the manner in which the disciplinary proceedings were conducted thereunder, by the Kentucky State Bar Association against petitioner, violative of the Due Process clause of the Fourteenth Amendment of the United States Constitution, as interpreted by this Court, and Kentucky Law?

A. Did the action of the Board of Governors of the Kentucky State Bar Association, in causing a Charge to be filed against Petitioner, based solely on *ex parte* and unsworn information illegally obtained, violate his right of Due Process of Law?

B. Did the admission into evidence of certain statements, alleged to have been made by Petitioner, over his objections, which were illegally obtained, violate the Due Process clause of the Fourteenth Amendment, as interpreted by this Court?

C. Was the finding of the Trial Committee, which was not predicated on the Charge, in violation of the Due Process clause, as interpreted by this Court?

D. Did the finding and recommendation of the Board of Governors, which were not predicated on the sole charge and the entire record, violate the Due Process clause and Kentucky Law?

E. Was the exclusion of petitioner and his counsel, from closed chamber deliberations of his case by the Board, while his substantial interests were being adjudicated, in the presence of members of the Bar who conducted the prosecution of the Charge, and the Trial Committee, who held the evidentiary hearing, in violation of his basic rights of Due Process of law and fundamental fairness?

II. Was the consideration of additional Charges, injected into the proceedings by Brief of the Prosecution to the Kentucky Court of Appeals, at the final adjudicatory stage, to support the finding of guilt by the Court, in violation of the Due Process clause of the Fourteenth Amend-

ment of the United States Constitution, as intrepreted by this Court?

III. Did the total failure of the Court, in its role of "Fact Finder," to accord any significance to the evidence introduced by the petitioner, at the evidentiary hearing, serve in itself to deny him the opportunity for a fair hearing on the merits of the case, as guaranteed him by the Constitutional requirements of Due Process of law?

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment XIV:

". . . (N)or shall any State deprive any person of life, liberty, or property, without the due process of law; . . ."

KENTUCKY RULES OF PROCEDURE IN DISCIPLINARY CASES

RCA 3.140 (in effect September 26, 1969):

"When it comes to the attention of the Board . . . the matter shall be reported to the President, who shall cause such investigation to be made . . ."

RCA 3.140 (as amended July 2, 1971):

"Annually, the Chief Justice shall appoint . . . an Inquiry Tribunal. The Tribunal may confer at such times as may be necessary to promptly dispose of all complaints referred to it . . ."

RCA 3.180:

> "If the Board determines, by a majority vote, that a complaint should be tried, a charge shall be prepared . . ."

RCA 3.370 (as amended July 2, 1971):

> "Only the President, the President-Elect, the Vice President and the fourteen duly elected members of the Board . . . shall be eligible to be present, participate in, and vote on any disciplinary case. Any member who has participated in any phase of a disciplinary case submitted to the Board under this Rule . . . shall be disqualified and the Chief Justice shall appoint a member to consider and act on the case."

RCA 3.380:

> ". . . a concise statement of: (c) the facts which the Committee deem proven by a preponderance of the evidence, the Committee's conclusions;"

RCA 3.390:

> "Upon receipt of the report of the Trial Committee the Board . . . shall promptly consider and act upon the entire record. The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty . . . Any Order recommending to the Court that disciplinary action be taken shall be advisory."

KENTUCKY RULES OF CIVIL PROCEDURE

RCA 1.350(b):

> "Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on the appeal and will be granted only when it appears that the Court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal, or the law applicable thereto."

STATEMENT OF THE CASE

Based on an *ex parte* and unsworn presentation of information by the Assistant Director, a paid employee of the Kentucky State Bar Association (hereinafter Association), the Board of Governors (hereinafter Board) of the Association, caused a charge to be filed by the Association against the Petitioner, on September 26, 1969. The charge is a derivative of an inquisition conducted by the Executive Committee of the Louisville Bar Association (hereinafter L B A) on August 14, 1969, concerning a letter typed on the letterhead of Petitioner. Viewed in the most favorable light this inquiry before the L B A was a summary proceeding, to which the Petitioner was directed to appear and explain the letter or have it referred to the State Bar Association. Questioning of the Petitioner commenced. He was not placed under oath and there was no court reporter present to transcribe accurately, whatever might be said. The inquiry was interrupted momentarily and Petitioner informed that he need not

make any statement in regard to the letter, if he chose not to, and that any statement that he made could possibly be used against him in any subsequent proceeding. Two members of the Board were also members of the Executive Committee of the L B A on August 14, 1969. One of these two was present at the inquiry on August 14, 1969 and on that same date the letter inquired about was sent to the Director of the Association and at the direction of the Board the Charge was subsequently filed on September 26, 1969. Said Charge alleged that "on or about June 5, 1969, Respondent knowingly caused to be written and mailed a letter to Mrs. Mary L. Vertrees . . . for the purpose of solicitation, in direct violation of Canon 27 of the American Bar Association's Canons of Professional Ethics."

An Answer to the Charge, the only responsive pleading permitted, was timely filed, which denied the Charge and raised the affirmative defense that the Charge did not constitute a proper ground for disciplinary action, under existing Kentucky law. The President of the Association, who signed the Charge, at the direction of the Board, of which he was a member, then appointed a Trial Committee of three members of the House of Delegates of the Association, to hold an evidentiary hearing on the Charge and to file a written report thereon, with the Board. The Board delegated responsibility for prosecution of the Charge to its employees, the Director and Assistant Director of the Association, who, in turn, associated the Com-

monwealth's Attorney of Daviess County, Kentucky, to assist in the prosecution of Petitioner.

The Kentucky Court of Appeals, by Order dated January 8, 1970 approved the appointment of the Trial Committee and empowered the Chairman thereof to try the issues, with powers of a "Circuit Judge." On June 1, 1970, an evidentiary hearing was held and the prosecution was conducted by the Commonwealth's Attorney, acting as Chief Prosecutor, aided by the Director and Assistant Director of the Association. Testimony of a witness regarding his recollection of statements allegedly made by Petitioner at the August 14, 1969 inquiry before the L B A was admitted into evidence over Petitioner's objections. This appears in the Transcript of Evidence of the Trial Committee hearing (T.E. 27-39). Objections to this testimony were renewed after this hearing, in Petitioner's Brief to the Trial Committee (Br. T.C. 5-8). Petitioner further asserted that all of the evidence admitted at the evidentiary hearing, was not sufficient to substantiate the Charge (Br. T.C. 1-7). The affirmative defense that the Charge did not constitute a proper ground for disciplinary action, in the face of existing Kentucky law, was renewed (Br. T.C. 7-12).

On March 10, 1971, more than nine months after the Trial Committee conducted its hearing on the Charge, it gave birth to "Findings and Recommendations of Trial Committee" and filed this with the Board. Petitioner was found guilty and punishment of a public reprimand recommended to the Board. Immediately thereafter at its regular scheduled meet-

ing on March 19, 1971, the Board once again took under consideration the Charge against Petitioner. Present at this deliberation of the Charge against the Petitioner, in addition to the full Board, who directed the initial filing of the Charge by a member, the President of the Association, were the three members of the Trial Committee, including the Chairman, who had been empowered by an Order of the Court dated January 8, 1970, to try the issues, with powers of a "Circuit Judge," the Director, Assistant Director and General Counsel of the Association, the last three being paid employees of the Association and hence, the Board. They were responsible for implementation and prosecution of the Charge filed by the President of the Association and member of the Board, that considered and evaluated information about the Petitioner, in the first instance. This closed chamber proceeding excluded the accused and his counsel. There came forth, a Finding of guilt and a Recommendation that punishment of Petitioner be increased from a public reprimand to a three year suspension from the practice of law, a devastating increase in the punishment. This Finding and Recommendation was filed with the Court. On March 30, 1971, the Court issued a rule, based on the Finding and Recommendation of the Board, directing Petitioner to show cause why such Finding and Recommendation of a three year suspension of the Petitioner from the practice of law should not be enforced by Order of the Court. A timely Response with Supporting Brief (Br. C.A.) was filed with the Court on May 14, 1971, wherein Petitioner

timely, properly and pointedly presented to the Court, every substantive and procedural question pertaining to the initial hearing by the Board, the Trial Committee evidentiary hearing and the final hearing of the Board which Petitioner contends deprived him of due process of law as guaranteed to him by the Constitution of the United States. Objections were renewed as to the manner evidence (so called) was obtained by the Board and admitted at the evidentiary hearing before the Trial Committee (Br. C.A. 10-13, 20, 24). The finding of guilt by the Trial Committee was objected to as not being predicated on the sole Charge filed against Petitioner (Br. C.A. 3-6). Petitioner objected to the finding of guilt, by the Trial Committee, on the initial Charge, as being contrary to existing Kentucky law (Br. C.A. 13-19). The Finding and Recommendation of the Board were objected to as not being predicated on the Charge, the NINETY-NINE (99) page Transcript of the evidentiary hearing held before the Trial Committee filed with the Board (Br. C.A. 21-23). A crucial issue was raised as to the exclusion of Petitioner and his counsel from closed chamber deliberations of the Board, which were conducted in the presence of the Trial Committee and members of the Association, who were paid employees of the Association, and hence, the Board, who were charged with prosecution of Petitioner and who were therefore his adversaries (Br. C.A. 20-27). Petitioner contended that the Trial Committee failed to file a complete report, containing a concise statement of facts deemed proven by a preponderance of evidence and

proper conclusions of law, to support its finding of guilt of the Charge (Br. C.A. 3-6). Petitioner earnestly contended that to subject him to Disciplinary Sanctions on the Charge, even if proven by a preponderance of the evidence, would convict him, without notice, that the act with which he was charged would constitute a a punishable offense under existing Kentucky law (Br. C.A. 13-19).

Subsequent to the filing, with the Court, on May 14, 1971, of Petitioner's Response with Supporting Brief, but prior to filing, with the Court on September 28, 1971, of the opposing Brief of General Counsel of the Association, and prior to final adjudication of the Charge, by opinion of the Court, delivered November 19, 1971, certain amendments to the rules of the Court, pertaining to Bar disciplinary cases, were made effective by Order of the Court, entered July 2, 1971. These amendments eliminated, almost in their entirety, those provisions that the Petitioner had argued in his Brief were objectionable, as being violative of his Fourteenth Amendment rights of procedural due process and fundamental fairness.

General Counsel for the Association filed its opposing Brief two (2) months and twenty-four (24) days after the Court amended its rules. The amendments make the Court's rules conform, NOW, to the standard Petitioner claimed was necessary, in his case, to afford him Constitutional guarantees of due process of law. Yet, the hired General Counsel of the Association devoted fifteen (15) pages, or approximately one-half (½) of his thirty-two (32) page Brief (pp. 11-26),

to an exhaustive argument that "The Disciplinary Proceedings by the Kentucky State Bar Association were not Conducted in Such a Way as to Deny the Respondent (Petitioner herein) any Constitutionally Guaranteed Rights." To add to this obvious enigma, the Association's Counsel used eight (8) more pages of his opposing Brief (pp. 3-11), to inject and add new Charges against the Petitioner. Under the rules of the Court, Petitioner had no means to respond to these new Charges, prior to an adjudication of the case on the merits, by the Court or in a Petition for Rehearing after the adjudication (RCA 1.350). The Charges added are, "Stirring up strife and litigation . . ." (pp. 4, 5, 6, 7, 8, 9, 10), "Ambulance chasing" (p. 5) and "to obtain employment through the use of employed agents or 'runners' . . ." (p. 7). The Association's Counsel meticulously TESTIFIES, that "his letters were obviously intended, not only to stir up strife and litigation, but to insure that he would be hired as the attorney to represent the injured party in such a law suit" (p. 5, para. 1).

The Opinion of the Court of November 19, 1971, which adjudged the Petitioner guilty and suspended him from the practice of law for one (1) year, speaks for itself. A Petition for Rehearing was timely filed in the Court below. Under the rules of the Court, a rehearing will be granted only when a material fact, controlling statute or decision has been overlooked, or when the issues of law have been misconceived (RCA 1.350). The Petition is limited to presentation of new material. *Grigsby* v. *Barr,* 77 Ky. (14 Bush) 330

(1878). In the Petition for Rehearing (P.R.), Petitioner urged that the Opinion of the Court neither answered nor recognized the serious challenge raised by his Brief, that the deliberative process of the Board, and hence, its recommendation to the Court, was tainted by the Board's previous exposure to *ex parte* allegations against Petitioner, upon which the Board itself directed that the Charge be filed (P.R. 1). Petitioner objected to the total failure of the Court to accord any significance to the evidence introduced by him at the evidentiary hearing (P.R. 2). Petitioner further objected to the judicial philosophy of the Court, under which it tacitly recognized the validity of his arguments by amendments to its own rules, while subsequently refusing to apply or even acknowledge the same principles properly raised by Petitioner (P.R. 1, 2, 4). The Court below denied the Petition for Rehearing and Petitioner's Motion for a Stay of the Execution and Enforcement of the Mandate, pending application to this Court for Review of Certiorari, on March 3, 1972. A Motion for a Stay Pending Review of Certiorari, filed in this Court on March 9, 1972 was granted on March 16, 1972, pending the filing of this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I

Certain Rules of Practice and Procedure of the Kentucky Court of Appeals for Disciplining Attorneys and the Manner in Which the Disciplinary Proceedings Were Conducted Thereunder By the Kentucky State Bar Association Against the Petitioner Are Violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States and Kentucky Law.

SUMMARY OF THIS REASON

Bar disciplinary proceedings in Kentucky are conducted pursuant to rules promulgated by the Kentucky Court of Appeals. In 1969, the rules in effect (RCA 3.010, *et seq.*) were adopted on June 27, 1963. Subsequently, this Court declared bar disciplinary proceedings to be quasi-criminal in nature. *Spevack* v. *Klein*, 385 U. S. 511 (1967). This Court's decision, in *In re Ruffalo*, 390 U. S. 544 (1968) held that disciplinary proceedings against an attorney are adversary and quasi-criminal in nature, and that the accused attorney is entitled to the constitutional guarantees of procedural due process of law. Further, this Court has recognized that due process requires an investigatory body to afford the person under investigation the right to confront and examine the witnesses against him, if that body has authority to make specific findings of guilt. *Jenkins* v. *McKeithen*, 395 U. S. 411 (1969). The Board of Governors of the Kentucky State Bar Association caused a Charge to be filed, based solely on

ex parte and unsworn information, obtained illegally and in violation of the due process clause. Certain statements alleged to have been made by the Petitioner and which were illegally obtained were admitted into evidence, over his objections in violation of the due process clause. The finding of guilt by the Trial Committee was not predicated on the sole Charge and is violative of due process. The finding was also contrary to Kentucky law (RCA 3.380). The Finding and Recommendation of the Board were not predicated on the sole Charge and the ENTIRE RECORD, in violation of the due process clause and Kentucky law (RCA 3.390). The exclusion of Petitioner and his Counsel from closed chamber deliberations of his case by the Board, conducted in the presence of members of the Bar Association who conducted the prosecution of the Charge against Petitioner and the Trial Committee who conducted the evidentiary hearing, while his substantial interests were being adjudicated, was violative of his most basic and fundamental rights of due process and fundamental fairness as guaranteed him by the Fourteenth amendment.

A. The Board of Governors of the Kentucky State Bar Association Caused a Charge to be Filed Against Petitioner Based Solely on Ex Parte and Unsworn Information Illegally Obtained in Violation of His Right of Due Process of Law.

When the Board caused a Charge to be filed against Petitioner, it was authorized as agent of the Court not only to make investigations of complaints against attorneys but also to cause charges to be filed and to make

specific findings of guilt or innocence. Petitioner's Brief (pp. 24-25) to the Court and Petition for Rehearing (p. 1) raised objections to the propriety of this procedure, which the Court did not answer or acknowledge. RCA 3.140 provides in part:

> "When it comes to the attention of the Board . . . the matter shall be reported to the President, who shall cause such investigation to be made. . . ."

RCA 3.180 provides in part:

> "If the Board determines, by a majority vote, that a complaint should be tried, a charge shall be prepared. . . ."

RCA 3.390 provides in part:

> "Upon receipt of the report of the Trial Committee the Board . . . shall promtly consider and act upon the entire record. The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. . . . Any Order recommending to the Court that disciplinary action be taken shall be advisory."

It is clear from the above that due process required that Petitioner should have been afforded the right to confront and cross-examine the witnesses against him at the Board hearing which authorized the Charge to be filed. *Jenkins* v. *McKeithen, supra.* He was denied that right. The Prosecution places great emphasis on the fact that all functions of the Court's agents are "advisory." However, it is significant that on July 2, 1971, the Court's rules were amended and the functions of the Board of instituting investigations and filing of

charges were removed. Presently RCA 3.140 provides in part:

> "Annually, the Chief Justice shall appoint . . . an Inquiry Tribunal. The Tribunal may confer at such times as may be necessary to promptly dispose of all complaints referred to it. . . ."

The Court tacitly recognized the validity of Petitioner's objections, by amending its rules on July 2, 1971, but rejected them by its Opinion of November 19, 1971.

B. Certain Statements Alleged to Have Been Made by Petitioner Which Were Illegally Obtained Were Admitted Into Evidence Over His Objections, in Violation of the Due Process Clause of the Fourteenth Amendment.

The *only evidence* introduced by the Prosecution, at the evidentiary hearing, to substantiate the Charge consisted of vague recollections of a witness to statements allegedly drawn from the lips of the accused at a meeting of the Executive Committee of the Louisville Bar Association, before which Petitioner had been summarily directed to appear. The circumstances under which the so-called evidence was obtained are distressingly similar to those found constitutionally offensive by this Court in *In re Ruffalo, supra.* These alleged statements were made when the accused was admittedly upset, chagrined and indignant; when he was not under oath; and when, regrettably, no court reporter was present to transcribe accurately and in what context, the words that were actually spoken at that inquiry.

This witness for the prosecution testified specifically as follows (T.E. 34-35):

> "Mr. Stivers did state that he was aware of the letter, he stated that he had prepared it, it did go out of his office *before* he had decided to send it."

While the above statement clearly favors the Petitioner (accused), the witness, on cross-examination testified that Stivers made the statement that the letter had been prepared in his office and he therefore assumed responsibility for it as it came out of his office (T.E. 37-38). Next, the witness testified that, *somehow,* "it became clear," to the witness that Stivers had prepared the letter (T.E. 38). These statements are obviously inconsistent. At best the testimony of the witness constitute *Findings of Fact* rather than relations of admissions against interest. These subjective "findings" of the witness were inadmissible as probative evidence under any criteria and were illegally obtained in violation of Petitioner's rights of due process as set forth by this Court in *In re Ruffalo, supra.*

C. The Finding of the Trial Committee Which Was Not Predicated on the Charge is in Violation of the Due Process Clause, as Interpretated by This Court.

The finding of the Trial Committee, set forth in the Appendix hereto states:

> "The Committee finds that the actions of Harold D. Stivers in writing the letter to Mary Vertrees, or even permitting and condoning it to be sent over

his signature, constitutes unethical conduct. The Committee believes that such conduct warrants disciplinary action."

This indecisive language makes it impossible to ascertain what the Committee determined was established by a preponderance of the evidence. This is conceded in the Opinion (p. 4) (App. 33, par. 1) of the Court. The rules of the Court require in RCA 3.380 ". . . a concise statement of: (c) the facts which the Committee deem proven by a preponderance of the evidence, the Committee's conclusions;" Clearly, the Committee did not find that Petitioner committed the specific act with which he was charged. Nor did the Court, in its Opinion. At most, the Committee and the Court found that Petitioner did one of three things and not the specific allegation of the Charge, upon which, if proven and if it merits disciplinary action *must* be the basis of which the finding of guilt is predicated. Out of the fog, one conclusion becomes painfully clear, *i. e.,* whatever happened, the Petitioner did it and he should be disciplined for it. It is submitted, that making an example of the Petitioner, as has been done by the Opinion of the Court, which appears in the Official Reported decisions, benefits neither the public nor the profession. The wrong is done. Granting Petitioner due process, denied below, can only serve to vindicate the profession as a whole. The Court below has shown utter disregard of the requirements set forth by this Court in *In re Ruffalo, supra.*

D. The Finding and Recommendation of the Board of Governors Were Not Predicafed on the Sole Charge and the Entire Record in Violation of the Due Process Clause and Kentucky Law.

The minutes of the regular meeting of the Board of March 19, 1971 recite that the case of Petitioner was called, the Trial Committee's report was submitted and ordered filed, and the matter "fully considered" whereupon the Board found Petitioner guilty and ordered his suspension from the practice of law for three years. Under the Court's rules, RCA 3.390, *supra,* the Board was required to consider and act upon the entire record. The minutes DO NOT recite that the ninety-nine page transcript of the evidence taken at the Trial Committee hearing was read and considered by each of the fifteen members of the Board. Yet the recommendation of the Trial Committee that a public reprimand was sufficient under the facts determined by the Committee was ignored and the penalty devastatingly increased by the Board to a three year suspension from the practice of law. Was this action the result of each Board member's reading and consideration of the Trial Committee's report? Surely, if the Board had considered the recommendation of the Committee as to the punishment to be so flagrantly disproportionate, it would not have been routinely filed, without comment. In any event, whether the Board's finding was based on that of the Trial Committee or something extrinsic, it deprived the Petitioner of notice of the true nature of the Charge against him, thus due process of law, as did that of the Trial Committee. *In re Ruffalo, supra.*

E. The Exclusion of Petitioner and His Counsel From Closed Chamber Deliberations of His Case by the Board, While His Substantial Interests Were Being Adjudicated, in the Presence of Members of the Bar Who Conducted the Prosecution of the Charge and the Trial Committee, Who Held the Evidentiary Hearing Was in Violation of His Basic Rights of Due Process of Law and Fundamental Fairness.

The presence of those who prosecuted the Petitioner, during the Board's deliberations, while Petitioner and his counsel were excluded is intolerable under our system of jurisprudence and undeniably offensive to the constitutional guarantees of due process of law. The Opinion (pp. 7-8) (App. 36, par. 3) of the Court below agreed and stated, "We concede that no person who has participated in the investigation, prosecution, or hearing before the trial committee should be present in the deliberate process of the Board of Governors. To the extent that their presence is permitted, any final action of the Board will necessarily be STIGMATIZED." Petitioner's Brief (pp. 20-27) attacked this procedure. It was filed with the Court May 14, 1971. The amended rules of the Court, promulgated July 2, 1971, expressly prohibited the practice. RCA 3.370 provides in part:

> "Any member who has participated *in any phase* of a disciplinary case submitted to the Board under this Rule . . . shall be *disqualified* and the Chief Justice shall appoint a member to consider and act on the case." (Emphasis supplied.)

As to the presence of those who conducted the investigation and prosecution of Petitioner, once again,

the amended rules of the Court expressly prohibit this practice. RCA 3.370 provides in part:

> "*Only* the President, the President-Elect, the Vice President and the fourteen duly elected members of the Board . . . shall be *eligible to be present,* participate in, and vote on any disciplinary case." (Emphasis supplied.)

In his Petition for Rehearing (p. 1), it was urged that Petitioner could not understand the judicial philosophy by which the Court could tacitly recognize the validity of his argument by its amendment to its rules, yet subsequently refuse to apply or even acknowledge the same principle properly raised by Petitioner. The Court dismissed the significance of this *STIGMA as it applied to Petitioner's case* on the basis that the Board's role was "little more than hortatory." It would be cavalier to assert that the Court's judgment is not influenced by the recommendations of bodies (agents) established under its own rules, and the great majority of reported cases, where the Board's recommendations are generally followed by the Court, do not bear out this assertion. Clearly there has been an unconstitutional mixing of functions and any purported separation was mere window dressing. True, the Board supposedly relied on a report of the Trial Committee, the trier of fact. Nonetheless it retained control over the fate of Petitioner from the moment it heard unsworn evidence against him and directed a Charge to be filed, to the moment it sent a recommendation to the Court that he be suspended from the practice

of law for three years. The appearance of a fair hearing becomes illusionary, when Petitioner and his counsel are excluded at the final and most vital stage in his case, while the prosecution is present.

Thus, stripped of artifice, in the final analysis the Board acted as Grand Jury, Jury and Judge in the prosecution of Petitioner.

II

The Consideration of Additional Charges Injected Into the Proceedings By the Brief of the Prosecution to the Kentucky Court of Appeals At the Final Adjudicatory Stage to Support the Finding of Guilt By the Court Is in Violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution as Interpreted By This Court.

This case ultimately reached the Kentucky Court of Appeals by a circuitous route, heretofore outlined in detail. Petitioner was prosecuted on a single Charge that he "knowingly caused to be written and mailed a letter to . . . for the purpose of solicitation . . . in violation of Canon 27 . . ." At this final adjudicatory stage, the Prosecution made an unprecedented maneuver. A Response to the rule issued against the Court was timely filed, with a Supporting Brief as permitted. The Prosecution then timely filed an opposing Brief, as permitted. The Prosecution's Brief can only be charitably characterized as "opposing" and only a complete reading of the entire contents can accurately reveal how far beyond the bounds of propriety it pervades. Totally new and additional charges were not

only asserted by the Prosecution, but allegations of facts (testimony) calculated to substantiate the new charges. Petitioner was not afforded a hearing on these new charges as there is no provision therefor at the adjudicatory stage. The case was taken under submission by the Court and the Opinion of the Court was rendered on November 19, 1971.

The Opinion (pp. 6-7) (App. 35, par. 2) held that the Kentucky cases cited and relied on by Petitioner throughout the proceedings, in support of his argument that the Charge (initial) was not proper, constituted the existing Kentucky law on September 26, 1969. In effect, this overruled the finding of the Trial Committee that these cases were mere dicta, overruled by other decisions of the Court, expressly or by implication and hence, the Board of Governors who acted thereon. It would logically follow, that since these lower tribunals (agents of the Court) had been overruled and since the Charge (initial) against Petitioner did not constitute conduct which would merit disciplinary action or sanction, under Kentucky law, that the Petitioner would stand exonerated. Nay! A foundation had been laid upon which to predicate a finding of guilt and a conviction of Petitioner, through the consideration of EXTRINSIC charges and allegations to support them. Even a cursory reading of the Prosecutions Brief (pp. 3-11) and the Court's Opinion (pp. 6-7) (App. 35, par. 2), together, leave no room for doubt that the new Charges were considered by the Court. For example, prosecution Brief, page 9, "Certainly, sending letters like the one in the case at bar would not be something done 'with impunity', es-

pecially where it was designed to stir up strife and litigation". The Court's Opinion, page 7 (App. 35, par. 3), "The plain purpose of the respondent's letter to . . . was to inform her that she probably had a cause of action and to solicit employment by her for its prosecution". The constitutional requirements of due process have been stretched beyond endurance, to achieve this result. Under these unparalleled circumstances, Petitioner has been deprived of notice of the true nature of the Charge (initial) against him and fundamental fairness, clearly denying him due process of law. As this Court has observed in regard to Bar disciplinary proceedings:

> "These are adversary proceedings of a quasi-criminal nature (Citations omitted). The Charge must be known before the proceedings commence. They become a trap when, after they are underway, the Charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh". *In re Ruffalo,* 390 U. S. 544 (1968).

Clearly, the Prosecution and the Court below and its agents have gone far beyond what this Court held was constitutionally offensive. If these proceedings go unchallenged, the judicial philosophy inherent therein, could be an almost lethal blow to fair treatment and scrupulous preservation of constitutionally guaranteed rights, in future Bar disciplinary proceedings, the very standard for which the profession should strive. The initial Charge should not have been filed. A proper interpretation of existing law, as applied to the facts,

should have resulted in a dismissal by the Committee or Board. Certainly, the Court, which properly interpreted the law, should have exculpated the Petitioner.

III

The Total Failure of the Court in Its Role of "Fact Finder" to Accord Any Significance to the Evidence Introduced By Petitioner At the Evidentiary Hearing Serves in Itself to Deny Him the Opportunity for a Fair Hearing On the Merits of the Case as Guaranteed Him By the Constitutional Requirements of Due Process of Law.

The manner in which the Court dealt with the evidence introduced by Petitioner is set forth in the Opinion (pp. 4-5) (App. 33, par. 1). The Court first indulges itself in *implications* that Petitioner "did one of three things—either he wrote the letter and had it sent, or he consciously permitted it to be written and sent, or he condoned it in the sense that he purposely gave his secretary reason to believe it would be desirable or permissible for her to write and send letters of this kind". From these three *implications*, the Court concludes (p. 5) (App. 33, par. 1), "In any of these circumstances it could be fairly said that he (Petitioner) 'knowingly'-caused the letter to be prepared and sent". Apparently, the Court decided that its conclusion required further justification, as an *inference* of knowledge was placed on Petitioner, since the letter was on his letterhead. The Court summarily dismissed the unequivocal testimony of Petitioner and his secretary (Transcript Evidence pp. 55, 71) that he neither

typed, signed nor mailed the letter nor directed that the letter be typed, signed and mailed. Finally, the Court, the Appellate Court of last resort, "saddled" itself with the role of "fact finder", and thus completely removed from the presence of the witnesses, with no opportunity to observe their demeanor, sincerity and credibility, concluded, "So, without beating about the bush we now find *the charge* to have been sustained by the evidence produced before the trial committee—that is to say, the evidence persuades us that the respondent (Petitioner) either deliberately caused the letter to be sent or else had enough to do with it to be chargeable with knowledge that it would be done".

The foregoing is a futile attempt to correct the equivocal and indecisive finding of the Trial Committee that Petitioner was guilty of the Charge about which it heard evidence. The Court concedes (p. 4) (App. 33, par. 1), "Undoubtedly the finding was not as direct as it could have been". Petitioner urges that there was no unequivocal or decisive finding at all, by the Committee or the Court. Assuming that there was a decisive finding by the Committee and the Court, on the Charge (initial), the Court's Opinion of guilt is bottomed on Extrinsic Charges, and not on the only Charge properly before the Court. This is fully explained in Reason II. This is an adversary proceeding of a quasi-criminal nature. *In re Ruffalo.* That there is a vast distinction in criminal law between thought and deed needs hardly to be stated. Petitioner is charged with "knowingly" committing a deliberate

act. Nothing more. There is not a shred of evidence in the record to establish that he knowingly committed the deliberate act. The only evidence is to the contrary. This was ignored by the Court. There has been an abortive attempt to supply the fundamental missing element of a volitional act or deliberative omission by finding Petitioner guilty of a pervasive and undefined notion of misconduct arising from some supposed misdeed or dereliction, *other than the specific act alleged in the Charge*. The Court below should have dismissed the Charge, based on the foregoing alone. Its failure to do so, by excluding Petitioner's evidence, clearly denied him due process of law.

CONCLUSION

As petitioner was denied due process of law, by the manner in which the Kentucky State Bar Association conducted the proceedings against him, which was tacitly recognized by the Kentucky Court of Appeals' subsequent amendments to its own rules and as the decision of the Kentucky Court of Appeals is violative of both substantive and procedural due process of law, in affirming what petitioner contended was existing substantive law and subsequently amending its procedural rules, while finding petitioner guilty on extrinsic charges, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WALTER B. SMITH
1019 Main Street
Shelbyville, Kentucky 40065
Counsel for Petitioner

COURT OF APPEALS OF KENTUCKY

(RENDERED: NOVEMBER 19, 1971)

KENTUCKY STATE BAR ASSOCIATION - - *Complainant*

v.

HAROLD D. STIVERS - - - - - - - *Respondent*

PER CURIAM

This proceeding comes before us on a rule to show cause why the respondent, Harold D. Stivers, should not be suspended from the practice of law for a period of three years and required to pay the costs of the disciplinary proceeding out of which the rule arose. RCA 3.450 (now RCA 3.410).

A charge was instituted by the Kentucky State Bar Association alleging that in June of 1969 the respondent, a member of the bar, "knowingly caused to be written and mailed a letter to Mrs. Mary L. Vertrees for the purpose of solicitation in direct violation of Canon 27 of the American Bar Association's Canons of Professional Ethics."

The respondent's answer denied that he had knowingly caused the letter to be written and mailed and stated affirmatively that it had been written, signed and mailed by some other person without his knowledge. Other defenses raised by the answer were that a violation of Canon 27 does not constitute proper grounds for disciplinary action and that under the authority of *Louisville Bar Association* v. *Hubbard*, 282 Ky. 734, 139 S. W. 2d 773, 775 (1940), "an attorney may personally solicit business with impunity, where he does not take advantage of the ignorance, or weak-

ness, or suffering or human frailties of the expected clients, and where no inducements are offered them."

The letter in question was as follows:

"Law Office
Harold D. Stivers
Tel. 587-0717

904 Portland Federal Bldg.
Louisville, Ky. 40202

121 Forest Drive
Jeffersonville, Ind. 47130

"June 5, 1969

"Mrs. Mary L. Vertrees
343 S. Shawnee
Louisville, Kentucky 40212

"Dear Mrs. Vertrees:

"According to the May 29, 1969 issue of the local Jeffersonville, Indiana newspaper, you were involved in an automobile accident recently, in Clark County, Indiana. The newspaper account indicates that you were not at fault and therefore entitled to recover any damages you suffered, as a result of the accident, from the party at fault.

"In my practice of law, I handle cases of this nature and am admitted to practice in all courts, both in Kentucky and Indiana. I am in a position to represent you and prosecute the case all the way through suit, if necessary.

"If I can be of service to you in this matter, please call me at the above number and I will arrange an appointment for you to come into my office for a conference.

"Sincerely,

/s/ Harold D. Stivers
HDS:jf"

A trial committee appointed by the president of the state bar association pursuant to the Rules of the Court of Appeals then prevailing conducted a full hearing in which the

respondent and his counsel (provided by the association) participated, following which the committee made findings and a recommendation that the respondent be given a public reprimand, one of its three members recommending, however, that he be suspended from practice for six months. The matter was then considered by the Board of Governors of the association, which adjudged the respondent guilty and recommended to this court that he be suspended from the practice of law for three years and be required to pay the costs of the proceeding.

The respondent was admitted to practice in this state in May of 1952 and was admitted to practice in Indiana in 1967. He resides in or near Jeffersonville, Indiana, and maintains an office for the practice of law in Louisville. A great many people who live in Louisville work in a munitions plant at Charlestown, Indiana, and from time to time these employes are involved in automobile accidents while traveling to and from their work along the highway between Jeffersonville and Charlestown. It occurred to the respondent that many of them would not be acquainted with an attorney or attorneys qualified to practice in both states. He was under the impression, which he says he confirmed through research and conversations with other lawyers, that it was within the bounds of legal ethics for an attorney to establish contact with a prospective client "in a proper way" so long as he did not engage in "ambulance chasing" or employ runners to solicit business. He had one secretary in his office, who seems to have had a good deal of initiative in that she had assisted in the drafting of form letters for collection work and often exercised her own discretion in selecting proper forms, preparing and signing letters, and mailing them without the specific knowledge or advance approval of the respondent. Both the respondent and his secretary had noticed frequent newspaper reports of automobile accidents in Indiana involving Kentucky residents, and they had discussed the prospect of drafting a letter

that might be used in making contact with such people. They both testified in this proceeding that about two months before June of 1969 the secretary on her own volition prepared a rough draft of a letter and showed it to the respondent, who made a few changes and then laid it aside for further discussion. According to the secretary, it was she who decided to send a letter to Mrs. Vertrees, and it was she who typed it, signed the respondent's name, and mailed the letter, along with five or six other similar communications, without the respondent's knowledge or approval. The respondent testified to the same effect. He said he had tentatively approved the form when first drafted, and saw nothing unethical in sending such a letter, but he denied that he had ever made a decision to do so or that he had any knowledge of the letter to Mrs. Vertrees until he later received an inquiry from the Louisville Bar Association. There was no evidence of any similar letters on other occasions or of the respondent's having had any more knowledge of the other letters sent by his secretary at the same time than he had of the letter sent to Mrs. Vertrees. He was not personally acquainted with Mrs. Vertrees.

The factual findings of the trial committee are mainly a summary of the evidence folowed by this conclusion:

> "The Committee finds that the actions of Harold D. Stivers in writing the letter to Mary Vertrees, or even permitting and condoning it to be sent over his signature, constitutes unethical conduct. The Committee believes that such conduct warrants disciplinary action."

In view of the specific charge that he *knowingly* caused the letter to be written and mailed. the respondent attacks this finding as equivocal and indecisive and as revealing an inability on the part of the trial committee to find substantial evidentiary support for a conclusion that the letter

was a deliberate act of his own. Undoubtedly the finding was not as direct as it could have been. However, it seems to us that it necessarily implies the respondent did one of three things—either he wrote the letter and had it sent, or he consciously permitted it to be written and sent, or he condoned it in the sense that he purposely gave his secretary reason to believe it would be desirable or permissible for her to write and send letters of that kind. In any of these circumstances it could be fairly said that he "knowingly" caused the letter to be prepared and sent. We are of the opinion that the evidence supports a conclusion that the respondent did have such knowledge. Absent conclusive proof to the contrary, the fact that the letter went out of his office on his letterhead is enough in itself to warrant the inference that it was done with his knowledge. The countervailing evidence given by the respondent and his secretary was not of such convincing force that reasonable men would be required to believe it. To the contrary, it would seem rather difficult to believe that the letter actually went out of the respondent's office *without* his knowledge and approval.

In any event, the report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. RCA 3.400, 3.420 (now RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual as well as the legal issues and of the final action to be taken. The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding. So, without beating about the bush we now find the charge to have been sustained by the evidence produced before the trial committee—that is to say, the evidence persuades us that the respondent either deliberately caused the letter to be sent or else had enough to do

with it to be chargeable with knowledge that it would be done.

At the time the letter was mailed RCA 3.170 (originally adopted by an order entered May 14, 1946) provided as follows:

> "The Court recognizes and accepts the principles embodied in the American Bar Association's Canons of Professional and Judicial Ethics as a sound statement of the standard of professional conduct required of members of the Bench and Bar, and the Court regards these Canons as persuasive authority in all disciplinary proceedings against members of the Bar."

Canon 27 provided that it is unprofessional "to solicit professional employment by circulars, advertisements, through touters *or by personal communications* or interviews not warranted by personal relations." (Emphasis ours.)

It is contended, however, that the "persuasive authority" of Canon 27 must yield to what this court has said to the contrary:

In *Chreste* v. *Louisville Ry. Co.*, 167 Ky. 75, 180 S. W. 49, 53 (1915), it was held "that mere solicitation on the part of an attorney, unaccompanied by fraud, misrepresentation, undue influence, or imposition of some kind, or other circumstances sufficient to invalidate the contract, is not in itself sufficient to render a contract between an attorney and client void on the ground that it is contrary to public policy."

In *Louisville Bar Ass'n.* v. *Hubbard*, 282 Ky. 734, 139 S. W. 2d 773 (1940), an attorney was suspended from practice for several improprieties including the solicitation of accident cases through an employed "runner," and in undertaking to distinguish between the permissible and the impermissible the court said, "While it is not within

keeping with the ethics of the profession, and we do not condone it, yet, an attorney may personally solicit business with impunity, where he does not take advantage of the ignorance, or weakness, or suffering, or human frailties of the expected clients, and where no inducements are offered them."

Both the *Chreste* and the 1940 *Hubbard* case were decided prior to adoption of the rule recognizing the Canons of Professional Ethics as persuasive authority. Nevertheless, in *Petition of Hubbard*, 267 S. W. 2d 743 (1954), the Court evidently signified its continuing approval of the above quoted passage from the 1940 *Hubbard* case by adding this modification: "'and where he does not stir up strife and litigation and hunt up defects in title or other causes of action and inform thereof in order to be employed to bring suit or collect judgment,' as condemned in Canon 28 of the American Bar Association." 267 S. W. 2d at p. 744.

In the 1954 *Hubbard* case the court approved an advisory opinion to the effect that Canon 28 prohibits a lawyer from soliciting employment by other lawyers to collect unsatisfied judgments. The opinion does not mention Canon 27. Clearly, however, it does condemn the solicitation of employment to bring suit. The plain purpose of the respondent's letter to Mrs. Vertrees was to inform her that she probably had a cause of action and to solicit employment by her for its prosecution. We are quite unable to understand how anyone could read the 1954 *Hubbard* opinion without realizing that it damns the solicitation of employment for the purpose of instituting litigation. It would seem more probably that the respondent neither knew nor cared what the law or the canons said. Had he entertained a sincere doubt about the matter he could have sought an advisory opinion under RCA 3.590, as had been done in the 1954 *Hubbard* case.

We reject out of hand the contention that the type of solicitation here involved was of such doubtful impropriety under the existing case law of this state that disciplinary sanctions against the respondent would deprive him of substantive due process guaranteed under the United States Constitution.

It is further argued that irregularities in the conduct of the proceeding by the Board of Governors constituted a denial of procedural due process, in that the chairman of the trial committee and certain employes of the bar association including its director and general counsel were present during the Board's consideration of the report and recommendations of the trial committee, whereas neither the respondent nor anyone representing him was permitted to attend or participate in the deliberate process. It is again the familiar problem of an administrative agency's mixing the functions of adversary and judge. Cf. *Mack* v. *Florida State Board of Dentistry*, 296 F. Supp. 1259 (D.C. Fla. 1969).

We concede that no person who has participated in the investigation, prosecution, or hearing before the trial committee should be present in the deliberate process of the Board of Governors. To the extent that their presence is permitted, any final action of the Board will necessarily be stigmatized. But it must be recognized that its action is nothing more than advisory to this court. So far as we are concerned the Board proceeding is mainly a screening device by which the respondent may be finally acquitted but cannot be convicted. This court is just as ignorant of what took place behind the closed doors of the Board meeting as is the respondent, and it is not bound to any degree by the result. In a matter as serious as this the advisory weight of the Board's action can be little more than hortatory, which means in simple English that the members of this court are going to exercise their own judgment anyway.

We are unanimous in the opinion that the charge is sustained by the weight of the evidence, and the consensus among the members of the court is that the respondent should be suspended from the practice of law in this state for one year, costs to be assessed as provided by RCA 3.520 (now RCA 3.450).

The proceeding having been conducted under the rules prevailing before the order of July 2, 1971, promulgating amended rules, the requirements of RCA 3.390, effective July 2, 1971, shall not apply.

It is ordered that the respondent be and he is hereby suspended from the practice of law in this Commonwealth for the period of one year, subject to reinstatement as provided by RCA 3.510, and required to pay the costs of this proceeding.

Attorneys for Complainant:

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Charles S. Cassis, Louisville, Ky.
William C. Stone, Louisville, Ky.
(712 Kentucky Home Life Bldg.)

Attorneys for Respondent:

Dailey & Fowler, Frankfort, Ky.
A. James Higgs, Jr., Frankfort, Ky.
(500 McClure Bldg.)

KENTUCKY STATE BAR ASSOCIATION

KENTUCKY STATE BAR ASSOCIATION - - *Complainant*

v.

HAROLD D. STIVERS - - - - - - - *Respondent*

FINDINGS AND RECOMMENDATIONS OF TRIAL COMMITTEE

The Kentucky State Bar Association preferred charges against Harold D. Stivers, a member of the Association. It is alleged that on or about June 5, 1969, Respondent knowingly caused to be written and mailed, a letter to Mrs. Mary L. Vertrees, 343 South Shawnee, Louisville, Kentucky 40212, and others for the purpose of solicitation in direct violation of Canon 27 of the American Bar Association's Canons of Professional Ethics.

Stivers, in his pleading, denied that he knowingly caused the letter to be written or mailed and claims the act was done without his knowledge. He denies that the acts were unethical or unprofessional in the first place. He affirmatively relies on *Louisville Bar Association* v. *Hubbard*, 139 S. W. 2d 775.

The Trial Committee ruled at the hearing that the proceedings should be conducted under rules which were in force at the time the letter was written. The Committee heard the evidence of various witnesses and makes this finding and fact.

Harold D. Stivers is and was a member of the Kentucky Bar Association. In the course of his professional practice, he discussed with his secretary a plan whereby he could notify people involved in accidents that he was admitted to

practice law in both Kentucky and Indiana. The letter is made a part of this finding by reference.

Stivers testified that he researched the law as it related to mailing such a letter. After his discussion and research, he told his secretary to draft a letter to carry out his plan. His secretary drafted the letter. He told her in substance that he could see nothing unethical about the draft.

Later, a letter conforming to the draft prepared by the secretary, was sent by the secretary to Mrs. Mary Vertrees. From the evidence, it was not clear as to the specific authority the secretary had for mailing the letters.

Mr. Stivers, in a conversation before the Executive Committee of the Louisville Bar Association, admitted that he knew the letter had been mailed.

In his testimony before the Committee, Mr. Stivers stated that, under the present state of the law in Kentucky, he could see nothing wrong with the letter he had written. He stated in substance he relied on the Hubbard Case at the time he wrote his letter and was still relying on it in justifying his conduct.

Under these findings of fact, the Committee is called upon to determine whether or not the conduct of Mr. Stivers was unethical and unprofessional. If the conduct was unethical and unprofessional, the Committee is called upon to make a recommendation as to appropriate disciplinary action.

The Committee finds that the actions of Harold D. Stivers in writing the letter to Mary Vertrees, or even permitting and condoning it to be sent over his signature, constitutes unethical conduct. The Committee believes that such conduct warrants disciplinary action.

The Committee is aware of the dictum in the Hubbard Case which was decided in February, 1940. Nevertheless, since the dictum in that case, the Court of Appeals has condemned personal solicitation by an attorney. See "*In Re: Carter*, 280 Ky. 746 and *In Re: Richard*, 244 S. W. 2d 476."

All of the Committee believe that it is the duty of lawyers to upgrade the profession rather than see how low they can bring it without crossing the forbidden line.

RECOMMENDATION

Two of the Committee recommend that Mr. Stivers be given a public reprimand for his conduct. They believe that Hubbard has been overruled only by implication and that under these circumstances such punishment would be adequate. One of the Committee recommends that Mr. Stivers be suspended from practice for six months.

Respectfully submitted,

By /s/ Edward H. Johnstone
Chairman, Trial Committee

FINDINGS AND RECOMMENDATIONS OF THE BOARD OF GOVERNORS

MEETING

BOARD OF GOVERNORS
Marriott Motor Inn
Clarksville, Indiana
March 19, 1971

The next order of business concerned the complaint against Harold D. Stivers. The Trial Committee composed of Edward H. Johnstone, Chairman, John M. Milliken and Robert E. Wohlwender having tendered a written report and the Chairman of the Trial Committee having conferred with the Board recommending that the respondent be adjudged guilty of unprofessional conduct with two committee men recommending public reprimand and one committee man recommending a six-months period of suspension, on motion duly made and seconded the report was ordered filed.

On call of the roll, the respondent was adjudged guilty on Count I by a roll call vote of 15-0. Upon a second call of the roll by a vote of 13-2, it was recommended that the respondent be suspended from the practice of law for a three-year period and the following order was entered:

IN RE: HAROLD D. STIVERS

FINDINGS AND RECOMMENDATIONS OF THE BOARD OF GOVERNORS

The above case having been called and a report having been submitted and the matter having been fully considered, the following Findings and Recommendations are made:

FINDINGS

That the respondent, Harold D. Stivers, be adjudged guilty.

RECOMMENDATIONS

It is therefore ordered that the respondent, Harold D. Stivers, be suspended from the practice of law for a period of three years and required to pay the costs of this action.

This March 19, 1971.

/s/ Allen Schmitt
President

/s/ Henry H. Harned
Director

71-1325

Supreme Court, U. S.
FILED
MAY 11 1972
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. A-950

HAROLD D. STIVERS - - - - Petitioner

versus

KENTUCKY STATE BAR ASSOCIATION - Respondent

On Petition for Writ of Certiorari to the
Court of Appeals of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION

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Counsel for Respondent

May 10, 1972

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. A-950

HAROLD D. STIVERS - - - - - - *Petitioner*

v.

KENTUCKY STATE BAR ASSOCIATION - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Kentucky Court of Appeals (App. A of Petition) is reported at 475 S. W. 2d 900.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

I. Whether the existing Kentucky case law and canons of ethics regarding solicitation were sufficiently definite so that the imposition of sanctions against the petitioner would deprive him of substantive due process.

II. Whether the disciplinary proceedings by the Kentucky State Bar Association and the Court of Appeals of Kentucky were conducted in such a way as to deny the petitioner procedural due process of law.

III. Whether the evidence supports the findings and judgment of the Court of Appeals of Kentucky.

RULES INVOLVED

Kentucky Rules of the Court of Appeals of Procedure in Disciplinary Cases

The pertinent provisions of Rules of the Court of Appeals, RCA 3.140, *et seq.*, are set forth in full in the Appendix hereto.

STATEMENT OF THE CASE

On September 26, 1969, a Charge was filed by the Kentucky State Bar Association against this petitioner, Harold D. Stivers. Said Charge alleged that on or about June 5, 1969, Mr. Stivers knowingly caused to be written and mailed a letter to one Mary L. Vertrees of Louisville, and others, for the purpose of solicitation, in direct violation of Canon 27 of the American Bar Association's Canons of Professional Ethics. A copy of this letter is reprinted in the text of the opinion below. In addition, it was alleged that these acts constituted unethical and unprofessional conduct; that the same were calculated to bring the bench and bar of Kentucky into disrepute; and that discipline of an appropriate degree should be administered to the respondent-below in accordance with RCA 3.175.

On October 24, 1969, the respondent-below filed an answer denying the allegations of the Charge; and by way of affirmative defense, respondent-below stated that he relied on certain decisions of the Kentucky Court of Appeals in support of his acts. Respondent-below requested a complete bill of particulars pursuant to the provisions of RCA 3.190. Complainant promptly furnished respondent-below with said bill of particulars, including a copy of respondent-below's letter to Mary L. Vertrees decribed in the Charge.

A Trial Committee was appointed by appropriate orders and in conformity with RCA 3.190.

On February 4, 1970, respondent-below requested the president of the Kentucky State Bar Association, to appoint counsel for him pursuant to the provisions of RCA 3.210. In accordance with respondent-below's request, A. James Higgs, Jr., of Frankfort was appointed as counsel to represent respondent-below. A hearing previously set for February 16, 1970, was reset for June 1, 1970, to allow appointed counsel adequate time to prepare the case for the hearing. A hearing on all issues was held on June 1, 1970. On March 10, 1971, the Trial Committee tendered its written report to the Board of Governors. The Trial Committee found that the respondent-below's acts constituted unethical conduct. On March 19, 1971, by a roll call vote, the respondent-below was adjudged guilty as charged by a vote of 15-0. Upon a second roll call, by a vote of 13-2, it was recommended by the Board of Governors that the respondent-below be suspended from the practice of law for a period of three years.

On March 30, 1971, a rule on the findings and recommendations of the Board of Governors of the Kentucky State Bar Association was issued by the Court of Appeals for the respondent-below to show cause why said recommendation should not be enforced by appropriate orders of this Court. The respondent-below duly filed a response to said rule.

Both the petitioner, Stivers, and the respondent herein, Kentucky State Bar Association, thoroughly briefed this case and all issues before the Kentucky Court of Appeals.

The petitioner raised basically three points before the Court of Appeals. The first dealt solely with the evidence in the case. The second issue raised was the argument that he was denied substantive due process of law because Kentucky case law permitted or he had reasonable grounds for believing it permitted the sending of the letter involved. The third issue raised by the petitioner was that he was denied procedural due process by the manner in which proceedings of the Bar Association were conducted.

The Court of Appeals rendered its decision on November 19, 1971. See *Kentucky State Bar Association* v. *Stivers*, Ky., 475 S. W. 2d 900 (1971). The Court in its per curiam opinion reviewed extensively the testimony in the record and upon its own review of the entire record found that the charge was sustained by the evidence. The Court also held that the petitioner was not deprived of substantive due process. Finally, the Court ruled that the petitioner was not deprived of procedural due process because the opin-

ions and recommendation of the Board of Governors are merely advisory and the Court itself makes its own decisions based on the facts and evidence in the record.

The Court ordered that the petitioner, Harold Stivers, be suspended from the practice of law for one year. This suspension was 2 years less than the suspension recommended by the Board of Governors.

The petitioner then filed a petition for rehearing with the Court and the petition was denied. A Motion for Stay Pending Review of Certiorari, filed in this Court was granted pending the filing of a petition for a writ of certiorari.

ARGUMENT

The issues raised by the petitioner in his petition for certiorari concern the constitutionality of the procedures utilized by the Court of Appeals of Kentucky in disciplining a member of the Kentucky State Bar Association.

Each issue raised by the petitioner will be answered briefly after a short consideration of the general issues in the case at bar.

I.

The Decision Below Was Based on an Adequate and Independent Non-Federal Ground

The petitioner throughout the entire proceedings in this case raised primarily two constitutional issues. First, the petitioner asserted that he was denied substantive due process of law because he was subjected to

disciplinary proceedings for conduct which he believed was permissible under Kentucky law. He asserted that this lack of notice that his actions would constitute a punishable offense denied him substantive due process.

The Court of Appeals in its decision did not find it necessary to pass on the constitutional issue directly. The Court made a thorough and exhaustive review of the Canons and Kentucky case law and determined that the Kentucky law regarding solicitation was abundantly clear in its condemnation of solicitation. In fact, the Court, after reviewing all the case law, stated specifically:

> We reject out of hand the contention that the type of solicitation here involved was of such doubtful impropriety under the existing case law of this state that disciplinary sanctions against the respondent would deprive him of substantive due process guaranteed under the United States Constitution.

The Court, therefore, rested its decision solely on the basis of their interpretation of the Canons of Ethics and case law in the State of Kentucky.

The second constitutional issue raised by the petitioner in his brief before the Court of Appeals of Kentucky was whether or not the disciplinary proceedings by the Kentucky State Bar Association were conducted in such a way as to deny him rights of procedural due process.

Here again, the Court in its Opinion, clearly based its decision on independent and substantial non-federal grounds. The Court concluded that since under the

Rules of the Court of Appeals and Kentucky case law the findingsof the Trial Committee and the Board of Governors, were only advisory and since the Court itself made an independent examination of the factual and legal issues involved, and since the Court itself was the only body which could impose any disciplinary action, there was no denial of procedural due process.

The Court clearly stated this position in its Opinion:

> But it must be recognized that its action is nothing more than advisory to this Court. So far as we are concerned, the Board proceeding is mainly a screening device by which the respondent may be finally acquitted but cannot be convicted.

The Court went on to point out:

> In a matter as serious as this the advisory weight of the Board's action can be little more than hortatory, which means in simple English, that the members of this Court are going to exercise their own judgment anyway.

It is equally clear that the Court did exercise its own judgment by the fact that it refused to follow the recommendations of the Board for a three year suspension and instead suspended the respondent for one year.

Both of these constitutional issues raised by petitioner were answered by Court through the interpretation of Kentucky law and the Rules of the Court of Appeals of Kentucky. There was no federal issue to be decided since the sole basis on which to determine the validity of the petitioner's constitutional argu-

ments rested on the proper interpretation of Kentucky law.

The third issue raised by the petitioner in his brief before the Court of Appeals concerned the evidentiary findings made by the Trial Committee. This issue was clearly defined by the Court upon independent non-federal grounds. The Court held that the report and recommendations of the Trial Committee and Board were only advisory. The Court also pointed out:

> This means, of course, that in the end, this Court must be judge of the factual as well as legal issues and of the final action to be taken.

The Court in its role as fact finder specifically and unequivocally held:

> We are unanimous in the opinion that the charge is sustained by the weight of the evidence. . . .

The petitioner has requested this Court to grant a petition for certiorari, and yet a close examination of the issues involved and a careful reading of the opinion rendered by the Court of Appeals clearly reveals that the results reached in this case by the Court of Appeals were based upon a clear and careful analysis of Kentucky substantive law, the Rules of the Court of Appeals and the record in the case as a whole. Certiorari certainly should not be granted merely to review the findings of fact made independently by the Court of Appeals.

II.

Although Not Affecting the Merits of This Case But Because the Disciplinary Rules of the Court of Appeals Have Been Changed, the Issues Presented Here Will Not Arise Again in This State.

The issues presented by the petitioner in this case are not only based on factual determinations by the Court, but are now essentially moot questions. As the petitioner himself has pointed out in his brief at page 11:

> . . . . certain amendments to the rules of the Court, pertaining to Bar disciplinary cases, were made effective by Order of the Court, entered July 2, 1971. *These amendments eliminated, almost in their entirety, those provisions which the petitioner had argued in his Brief were objectionable, as being violative of his Fourteenth Amendment rights to procedural due process and fundamental fairness.* (Emphasis added.)

The petitioner throughout his brief has strenuously urged that the Court by the amendments effect on July 2, 1971, "tacitly recognized the validity of his arguments." *The Court did no such thing.* This case began with a charge being issued against the petitioner in September, 1969. At the time the decision of the Court of Appeals was delivered in November, 1971, the new rules had already been announced. The opinion clearly reflects that the Court was cognizant of the rule changes which had been put into effect. If there had been any denials of constitutional rights to the peti-

tioner, the Court would have been even more cognizant and aware of such, but there were none.

This same argument was raised by the petitioner-below in his petition for rehearing by the Court of Appeals. That petition was denied. The petitioner has attempted to latch on to these changes by alleging that the subsequent amendment of the rules indicates that the previous rules and procedures were unconstitutional. Such an argument carries little convincing weight, in view of the fact that the Court of Appeals specifically found that there were no constitutional violations of due process in these proceedings, and in view of the fact that the rules were amended prior to the decision being rendered in this case.

If, in fact, the Court had overlooked these changes or had felt that the previous procedures were unconstitutional, a petition for rehearing would have undoubtedly been granted. It was not.

III.

The Decision Below Is Correct and There Are No Justiciable Reasons for Granting the Writ

The petitioner in setting forth his reasons for granting the writ has set forth the following grounds:

I. The rules and procedures violated the Due Process Clause of the Fourteenth Amendment.

II. The Due Process Clause was violated by the insertion of additional charges in the brief of the Bar Association before the Court of Appeals.

III. The Court failed to give significance to the evidence introduced by the petitioner.

Each of these specific reasons will be briefly commented on, for the purpose of showing the correctness of the decision below.

Under the Rules of the Court of Appeals as they have existed in the past and as they are presently written, a framework has been set up by which complaints against members of the state bar association can be handled. The final authority in all bar disciplinary proceedings with respect to a determination of guilt and with regard to punishment is specifically and solely vested in the Kentucky Court of Appeals. All other stages in the processing of disciplinary actions are merely advisory, and the Court is free to make its own determinations with respect to both factual and legal issues. This is true because of the inherent power of the court to discipline members of the bar association.

Even a cursory examination of the Rules of the Court of Appeals reveals that constitutional safeguard throughout the entire proceedings. As the Court pointed out in its opinion, each stage is mainly a "screening device" by which a respondent may be finally acquitted but cannot be convicted.

The petitioner has asserted in his brief that due process requires that he should have been present at the Board meeting which authorized the charge to be filed, citing *Jenkins* v. *McKeithen*, 395 U. S. 411 (1969). Under the Rules, if a complaint is determined to be unfounded it can be declined even without an investigation, RCA 3.160. Where a complaint indicates that an attorney may be guilty of unprofessional

conduct an investigation may be made, RCA 3.140. The Rules, RCA 3.150 and RCA 3.170, specifically provide that investigations are to be prompt and that nothing connected with a disciplinary proceedings is to be made public.

Pursuant to Rule 3.180, the Board determines by a majority vote, whether a complaint should be tried, and if so, it prepares a charge, setting forth the facts allegedly constituting unprofessional conduct.

The charge, therefore, is really the initial step in a disciplinary proceeding. It involves neither a public proceedings nor an evidentiary or adjudicatory stage. Its sole function is to initiate subsequent formal proceedings, i.e., trial committee action, at which the defendant is granted all constitutional procedural rights. RCA 3.280. The whole purpose behind the procedural steps taken by the bar association is to "weed out" unfounded complaints. The facts in *Jenkins (supra)* are clearly distinguishable from the facts and procedures involved here. The issuance of a charge is not a fact finding procedure, but is rather a single formal step, taken in order to get the case before the Trial Committee which hears all the evidence presented on both sides and then determines its recommendations.

The stage of the proceeding in *Jenkins (supra)* was mostly akin to the Trial Committee proceedings involved herein. The Court was concerned in *Jenkins (supra)* with the stage in the proceedings where the Commission called witnesses to testify in a public hearing. The stage referred to in the present case is merely

the issuance of a charge. It involves no hearing, witnesses or testimony except to the extent that the Board determines that the complaint is not unfounded. The actual fact finding hearing is before the Trial Committee at which the defendant enjoys the full panoply of procedural safeguards.

Pursuant to RCA 3.190, there is complete impartiality by requiring that the three members of the Trial Committee be members of the House of Delegates, that they shall not be from the same judicial district as the respondent and that the chairman shall possess the qualifications and powers of a circuit judge under a commission from the Chief Justice of the Court of Appeals.

Under the duly adopted rules, the Trial Committee is in all respects the "adjudicator of fact." It is this Committee which is charged under the rules with hearing the evidence presented in the case and per RCA 3.380 shall state what "facts" were proven as well as its conclusions. The petitioner herein makes no allegation or suggestion that this stage of the proceeding was in any way "tainted" with any irregularity or unconstitutional mixing of functions. All constitutional safeguards are provided the respondent at this stage of the proceedings, including (a) the right to challenge the qualifications of any member of the Trial Committee, RCA 3.210, (b) the right to be represented by counsel, RCA 3.280, (c) right to a hearing, RCA 3.280, and (d) all rights afforded a party by the rules of Civil Procedure, including the right to introduce evidence, cross-examine witnesses, compel the attendance of witnesses, the right to remain silent, RCA 3.280.

The Trial Committee proceedings, therefore, are without question in conformity, compliance, and with complete regard for the respondent's rights to procedural due process. The respondent does not intimate or suggest that any evidence, reports, etc., were before the Trial Committee or that they were in any way influenced by any testimony not presented into evidence, all of which the respondent had a right to inspect and cross-examine. RCA 3.370 specifically provides that the proceedings shall be reported, and if the recommendation is other than a private reprimand then the proceedings shall be transcribed. It is the transcript of evidence at the Trial Committee hearing which provides the Court with the necessary information on which to base its decision as to disciplinary sanctions. They have before them the "evidence" that was in fact before the Trial Committee, all of which was subject to objections and cross-examination by the petitioner's counsel.

The rules provide a further step in which the Board of Governors considers the entire record. It may then decide whether the respondent is guilty or not guilty. It affords additional protection in that if the respondent is found not guilty, the Board's action is final. See RCA 3.390. If a respondent is guilty, the Board then votes on the degree of disciplinary action to be recommended. Other than a private reprimand, all other degrees of discipline are *only recommendations* to the Court. The rules specifically recognize that *any order recommending to the Court that disciplinary action be taken shall be advisory only.* See RCA 3.390.

The Court of Appeals then under its inherent and statutorily recognized powers ultimately passes to the question of whether or not the respondent is guilty of professional misconduct; and if so, the degree of punishment to be imposed. The Court of Appeals is the only body empowered to impose discipline other than a private reprimand.

The recitation of the procedure is extremely important in exposing two very basic points:

(1) The *Trial Committee is the adjudicator of fact* and they provide all the constitutional safeguards to the respondent and make a transcript of all the evidence, and

(2) The Court of Appeals is the *only* body which can or does officially impose any sanction or passes finally on the guilt or innocence of the attorney as well as the imposition of discipline.

Therefore, it is clear that the Board of Governors is acting only in an advisory capacity based on the evidence presented at the Trial Committee hearing. The Board of Governors is, in no way the adjudicator of *fact* and in no way renders any *final decision* in regard to sanctions. It is merely an advisory agent of the Court and as the name suggests, its advice may be freely rejected by the Court which it frequently has done, and which it in fact did in this case by reducing the suspension from a recommended three years to a one year suspension. It is certainly clear that "the Court" is the only one that will make the ultimate decision in all disciplinary cases. It is so cited in the case below.

The remaining two grounds cited by the petitioner are of little validity. The petitioner has asserted that additional charges were brought by counsel for the Bar Association in the brief filed before the Court of Appeals.

The petitioner in his brief before the Court of Appeals and indeed throughout the entire proceedings in this case attempted to justify the solicitation of business by citing Kentucky case law which he asserted gave him reasonable grounds to believe that the sending of the letter involved here was not unobjectionable or unprofessional conduct. Additional charges were not levied against the petitioner, rather the cases cited by the petitioner were merely analyzed and in fact distinguished. It is interesting to note that these cases were all originally cited by the petitioner in his brief. The entire argument regarding solicitation was undertaken for the purpose of showing that the state of the law in Kentucky was obviously clear so that the petitioner's argument with regard to his denial of notice and substantive due process were unfounded. The Court of Appeals in its decision, also reviewed the Kentucky law and Canons and agreed that there could not and was not a denial of substantive due process.

It is also worthy to note that this constitutional argument was not raised by the petitioner in his petition for rehearing before the Court of Appeals, and, therefore, should not be considered by the Court as a basis for granting certiorari now.

Finally, the petitioner once again attacks the weight which the Court gave to the evidence in this case. Even

a cursory examination of the Court's opinion in this case reveals that the Court considered all the factual and evidentiary matters in this case. If the Court gave little significance to the petitioner's evidence it was due to a lack of credibility of the evidence and not due to an oversight on the part of the Court. Here again, the petitioner has urged as a reason for granting certiorari an issue which is not valid. The factual determination by the Court of Appeals and the weight and credibility are accorded to the evidence are not properly reviewable especially where the Court, directly in its opinion, reviewed the evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari be denied.

Respectfully submitted,

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PERTINENT RULES OF THE COURT OF APPEALS OF KENTUCKY IN DISCIPLINARY CASES

RCA 3.140 **Initiation of Disciplinary Cases.**

When it comes to the attention of the Board or any officer that an attorney may have been guilty of unprofessional conduct, or has been complained against for such conduct, the matter shall be reported to the President who shall cause such investigation to be made, as may be necessary and he shall cause notice of the pendency of the complaint to be given to the attorney involved who shall have fifteen days within which to respond thereto.

RCA 3.150 **Investigation and Trials to be Prompt.**

All investigations and the trial of all disciplinary cases shall be begun, prosecuted and completed as promptly as the ends of justice will permit. Neither the unwillingness of the complainant to prosecute, nor an offer of settlement, compromise or restitution shall delay the investigation, trial or report to the Board.

RCA 3.160 **Unfounded Complaints.**

If the President deems any accusation, letter or complaint against an attorney unfounded, he may withhold action thereon until the next meeting of the Board at which time he shall submit the matter to the Board. Except in cases where a fee or deposit for costs has been paid in advance to an attorney by a client, a complaint which is based solely upon an attorney's failure to answer letters, or to do so punctually, or to prosecute the business of the attorney's client with such speed or diligence as the latter expects or desires, shall be deemed unfounded and the President, without referring the matter to the Board may decline to entertain it and direct the Director to return the complaint to the person from whom received with a letter of explana-

tion. When a complaint which the President deems to be unfounded is by him referred to the Board, the Board may, without investigation, decline to entertain the complaint and direct the Director to return the same to the person from whom received with a letter of explanation.

RCA 3.170 **Proceedings not Public; Exception.**

Nothing connected with a disciplinary case shall be made public unless ordered by the Court.

RCA 3.180 **Charges; Form; by Whom and Where Filed.**

If the Board determines, by a majority vote, that a complaint should be tried, a charge shall be prepared stating the name and present or last known address of the attorney and facts alleged to constitute unprofessional conduct. The charge shall be signed by the President or such officer of the Association as the Board may authorize and filed in the office of the Director.

RCA 3.190 **Appointment of Trial Committee; its Powers and Qualifications.**

If the pleading presents any issue of fact, the President shall appoint a Trial Committee composed of three members of the House of Delegates one of whom shall be named Chairman, and none of whom resides or has his office in the same judicial district as the respondent. The chairman shall possess the qualifications and powers of a circuit judge under a commission from the Chief Justice. The Director shall immediately notify each member of the Trial Committee of his appointment, and shall furnish each with a copy of the pleadings.

RCA 3.200 **Notice of Appointment of Trial Committee and Hearing.**

Upon the appointment of a Trial Committee the Director shall notify the parties of the names and addresses of its members. The Chairman of the Trial Committee shall fix

the time and place of the hearing and the Director shall give notice thereof to the parties. Such hearing shall be not less than twenty days after the date of the notice.

RCA 3.210 **Challenge to Qualifications of Trial Committee.**

Any time, not later than ten days before the date set for hearing the respondent may, by motion, challenge for cause any member of the Trial Committee. If the challenge is such as might disqualify a circuit judge the President shall relieve the challenged member and immediately fill the vacancy.

RCA 3.230 **Notice of Filing Charges; Time to Answer.**

Upon the filing of a charge the Director, by certified mail return receipt requested, shall furnish the respondent with a copy of the charge and notify him:

(a) Of the name and address of the attorney for the Association.

(b) That he must within twenty days after receipt of the notice file his answer and three copies with the Director and serve a copy of the answer on the attorney for the Association.

RCA 3.250 **Pleadings and Preliminary Motions.**

There shall be a charge and answer and, when permitted by the Trial Committee, a reply and such amendments to pleadings as may be required to serve the ends of justice. Averments in an answer or a response shall be taken as denied or avoided. No preliminary motions may be filed except:

(a) For a more definite statement of the charge or answer.

(b) Challenging the qualifications of the Trial Committee as provided by RCA 3.210.

RCA 3.260 Filing and Processing of Pleadings and Other Papers.

After a charge is filed and before any proceedings are instituted in the Court, an original and three copies of all further pleadings, notices, motions, orders and briefs shall be sent to the Director who shall file the original and forward one copy to each member of the Trial Committee. All other reports, inquiries, letters, letters of transmittal and other communications shall be sent to, and processed by, the Director. No such paper or copy thereof shall be sent by, or on behalf of any party to the Court, the Board, the Trial Committee or any member thereof.

RCA 3.270 Service of Pleadings and Other Papers.

A copy of any pleading after the charge and of any notice, motion, order and brief shall be served by counsel upon each other counsel of record in the proceeding.

RCA 3.280 Rights of Respondent Against Whom a Charge has Been Filed.

The respondent against whom a charge has been filed shall have the right to be represented by counsel and entitled to a hearing before a Trial Committee. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in the investigative file of the Board. He shall have the right to an oral argument or to file a brief before the Trial Committee. He shall be afforded a full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the President, upon written request in affidavit form, made within twenty days after service of the Charges, shall appoint counsel for the respondent.

RCA 3.340 **Procedure When Pleadings Present Only an Issue of Law.**

If the pleadings only present issues of law the Board shall fix a time for the filing of briefs. Thereafter, the Board shall consider the briefs and report its recommendation to the Court.

RCA 3.350 **Order of Proceedings and Burden of Proof.**

The Trial Committee shall determine and regulate the order of proceedings at the hearing. Upon the application of a party or upon direction of the Trial Committee the Director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by a preponderance of the evidence. In reinstatement hearings the burden shall rest upon the applicant. Before submission the Trial Committee may direct such oral arguments as it deems appropriate and receive briefs from all parties on such terms as it may impose. After submission of the case to the Trial Committee there shall be no further oral argument or briefing either before the Trial Committee or before the Board.

RCA 3.360 **Introduction and Admissibility of Evidence, Evidence Taken in Other Proceedings.**

The testimony at all hearings shall be in person, except that the parties may use depositions under the same standards as those prescribed by the Kentucky Rules of Civil Procedure. The Rules of evidence applicable in civil actions shall apply.

Where, in any proceeding, evidence has been taken under oath upon due notice to the Respondent, and at the taking of which Respondent has appeared, either in person or by counsel, or as attorney for any party, a duly certified transcript of all, or the essential portions, of such proceed-

ings may be used as evidence in any hearing provided for in RCA 3.200, or in any investigation antecedent to or in connection with any disciplinary case involving the same charge or any charge growing out of matters connected therewith, and such transcript and record, or parts thereof, may be made a part of the record on any hearing or investigation.

RCA 3.370 **Transcript of Evidence.**

The proceedings before the Trial Committee shall be reported by a reporter appointed by the Trial Committee. However, after hearing, if the Trial Committee is of the unanimous opinion that the respondent should only be administered a private reprimand or that all charges should be dismissed the Trial Committee may, with the consent of the parties, direct the reporter to preserve all notes of the hearing but defer a transcription of the record until ordered by the Board to prepare such transcript. In all other proceedings the testimony shall be transcribed.

RCA 3.380 **Trial Committee to File Report With Board.**

When a disciplinary proceeding has been finally submitted, the Trial Committee shall promptly file with the Board the entire transcript of the proceeding, the transcript of testimony together with such briefs as may have been filed and a written report in the nature of a findings of fact and conclusions of law, which shall contain a concise statement of:

(a) the charges made against and the defense offered by the respondent;

(b) the proceedings had;

(c) the facts which the Committee deems proven by a preponderance of the evidence, the Committee's conclusions; and

(d) its recommendations as to the disposition of the case.

The Trial Committee's report shall constitute a part of the record in the case and a copy of such report shall be served upon counsel for the parties. The report shall be advisory.

RCA 3.390 **Board's Action on Trial Committee's Report.**

Upon receipt of the report of the Trial Committee the Board, except the Chairman and Chairman-elect who shall have no vote in any disciplinary proceedings, shall promptly consider and act upon the entire record. The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent is found not guilty, the Board's action is final. If the respondent be found guilty, the Board shall then decide, by a second roll call vote, the disciplinary action to be recommended. Both the finding of guilty and the disciplinary action to be recommended must be agreed upon by a majority of the members of the Board entitled to vote in disciplinary proceedings. The result of each of the two votes shall be recorded in the Board's minutes. The president shall sign and file with the Director an order setting forth the Board's action and the Director shall mail copies of such order to the parties and to each member of the Trial Committee. If discipline is ordered by the Board or recommended to the Court a copy of the order shall be filed with the Clerk. Any order recommending to the Court that disciplinary action be taken shall be advisory. Promptly after the filing of the order of the Board the Director shall file with the Clerk the entire record commencing with the charge and a certified bill for the costs and expenses incurred by the Board and the Trial Committee in the investigation preliminary to and in the conduct of the proceedings.

RCA 3.400 **Degrees of Discipline.**

Upon a finding by the Board of guilt of unprofessional conduct, discipline may be administered by way of private reprimand issued by the Board without further proceedings or right of appeal to the Court; or, by the Court, upon

recommendation by the Board, by way of public reprimand, censure, suspension from practice or disbarment. If a private reprimand is issued, it shall not be made public and shall be transmitted only to the respondent, or to his attorney, and to the attorney for the complainant.

RCA 3.420 **Procedure in the Court.**

Promptly upon the filing of the order as provided in RCA 3.390, the Clerk shall advance the case on the docket and shall forthwith issue a rule against the respondent returnable within twenty days after service of the rule requiring the respondent to show cause why he should not be adjudged guilty of unprofessional conduct and disciplined therefor. When the respondent is proceeded against by warning order, the rule shall be deemed to have been served thirty days after the date of the making of the warning order. If response is not filed when due the Court shall enter judgment against the respondent, adjudging him guilty of unprofessional conduct and disciplining him. When a response is filed, the respondent shall furnish a bond with surety acceptable to the Clerk, conditioned that if the principal in the bond be disciplined by the Court, he will promptly pay all costs incurred in the proceeding, including those certified under RCA 3.390. If he files his response in forma pauperis no bond shall be required.

RCA 3.450 **Disposition of Case.**

Upon submission of the case the Court will enter such orders as it may deem proper. The provisions of the Rules regarding petition for rehearing and issuance of a mandate shall apply. The Clerk shall promptly furnish a copy of the order of disposition to all parties and the Director. Every such order except those for private reprimand, shall be published as are other opinions of the Court and an attested copy shall be forwarded by the Clerk to the circuit clerk who shall record the attested copy in the Commonwealth Order Book and index the same.